

2 Television on the Internet Challenges for Audiovisual Media Policy in a Converging Media Environment

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The audiovisual media landscape is characterised by a growing convergence of both media services and the way they are consumed and delivered. This convergence—understood here as the progressive merger between traditional broadcast and Internet services²—is challenging media policies and regulation across the world. In 2011, for instance, the Australian communications regulator (ACMA) published a report stating that the majority of legislative concepts that form the building blocks of current communications and media regulatory arrangements are either “broken” or under significant strain from the effects of convergence.

The European Commission, too, (re)opened the discussion on the implications of the ongoing transformation of the audiovisual media landscape through the publication of a Green Paper in April 2013 (European Commission, 2013). This Green Paper comes only 5 years (and 4 months) after the adoption of the Audiovisual Media Services Directive (AVMSD) in December 2007 (coordinated in 2010 by Directive 2010/13/EU), which was—at that time—supposed to offer an answer to the merging of previously distinct TV content distribution channels. The AVMSD introduced new definitions and revised existing rules in order to create a level playing field between traditional and new services. Its main objective was to enhance legal certainty and to make the legal framework for the audiovisual sector more future proof and fit for the Internet era (Valcke & Lievens, 2009; Valcke & Lefever, 2012).

The European legislator, however, could hardly foresee the rocketing popularity of online video portals like YouTube and DailyMotion or social media like Facebook and Twitter. Nor did it consider appropriate regulatory responses to current trends such as the integration of Web 2.0 features into modern television sets and the widespread adoption of tablets, games consoles and Blu-ray players—often referred to as “smart TV,” “hybrid TV,” or “connected TV.”³ In its first report on the application of the AVMSD, the European Commission noted that the emergence of connected or hybrid TV integrating Internet and Web 2.0 features into modern television receivers “marks a new stage in the convergence of Internet and TV,” urging

the European legislator to test the regulatory framework set by the directive against evolving viewing and delivery patterns (European Commission, 2012).

The aim of this chapter is to contribute to the academic and policy discourse revolving around the future of broadcasting regulation. Is this regulation a legacy from the analogue past, which was characterised by scarcity? Or are there still reasons to impose specific standards (for instance in relation to the prohibition of hate speech, the protection of minors, cultural diversity, or the identification of commercial communications) on certain categories of media types or media content? If so, where—in a digital and converging media environment—should we draw the line between “regulatable” and “unregulatable” content, and whom should be considered as the responsible provider with editorial control?

In the following pages, this chapter will examine the concept of “audiovisual media service” as the fundamental building block in Europe to regulate TV content in an increasingly digital and connected media environment. The various constitutive elements of the legal definition will be dissected so as to identify major fallacies in the emerging connected media landscape. Additionally, it will also explore how different member states have interpreted the scope of the directive and what difficulties national regulators encounter with regard to the applicability—in terms of material scope—to hybrid services, such as news video websites.⁴

UNRAVELLING THE NOTION OF AUDIOVISUAL MEDIA SERVICE

Definition

Seven Cumulative Criteria

With the adoption of the AVMSD in 2007,⁵ the European legislator broadened the scope of EU-wide harmonised broadcasting rules to include every “audiovisual media service” (AVMS): “a service as defined by Articles 56 and 57 [lex 49 and 50] of the Treaty of the Functioning of the European Union which is under the editorial responsibility of a media service provider and the principal purpose of which is the provision of programmes in order to inform, entertain or educate, to the general public by electronic communications networks.”⁶ The idea was to put forward a technology-neutral definition that would cover all comparable video services, irrespective of the platform or technology used to deliver them to the end user. The definition is usually broken down into seven cumulative criteria: (a) economic service; (b) under editorial responsibility; (c) of which the principal purpose is; (d) the provision of programmes; (e) in order to inform/educate/entertain; (f) to the general public; (g) by electronic communications networks.

How these criteria are further clarified by the AVMSD and interpreted by national media regulators will be studied in the subsequent sections. From this discussion, it will become clear that recent developments in the media landscape—and particularly online—have put some of these criteria to the test. Media regulators across Europe are struggling to apply the criteria to hybrid services such as online news sites or online video platforms that offer both professional and amateur content.

Linear Versus Nonlinear

The notion of AVMS includes both *linear* and *nonlinear* services.⁷ The former (also called “television broadcasts” by the directive) are video services provided by a media service provider for *simultaneous viewing* of programmes on the basis of a *programme schedule*. In other words, the media service provider decides on the moment in time when these services are transmitted (push services) and the order in which the programmes are shown. By contrast, nonlinear services are delivered by a media service provider *at a moment chosen by the user* and at his/her individual request on the basis of a catalogue of programmes selected by the media service provider (on-demand or pull services).

The correct qualification as linear or nonlinear service is not without its legal consequences. Based on this distinction, the AVMSD installed a so-called *graduated* (or *two-tiered*) regulatory regime, which implies that linear services are subject to strict rules whereas nonlinear services are only subject to “light touch” regulation.⁸ In some member states, these services are monitored by separate regulatory bodies (e.g., the Authority for Television on Demand [ATVOD] versus Ofcom in the UK).

Whereas this distinction was still rather straightforward in 2007, online video playlists and automated selection tools are increasingly blurring the line between the two categories.

Take NMArtv, for example. This popular Taiwanese animated news provider has—amongst others—its own YouTube channel.⁹ At first glance, this service bears a lot of resemblance to traditional television services. The videos automatically follow one another in a continuous playback, sometimes interrupted by a commercial break. Moreover, there seems to be at least some level of editorial responsibility over the audiovisual material presented. The individual videos themselves also show a lot of similarities with conventional news reporting, albeit with a playful undertone. If NMArtv were to be qualified as an AVMS (and assuming it would fall under EU jurisdiction), it would be subject to a whole set of rules regarding, for instance, advertising and the protection of minors (particularly relevant taking into account the often racy nature of the videos it offers). If it were to be qualified as a linear service, these rules would be even more stringent (implying, for instance, adding daily limits to the amount of advertising that could be included in the service).

The NMArtv example clearly illustrates the difficulties facing media regulators in Europe. In its Green Paper on Media Convergence (European Commission, 2013), the European Commission questioned whether the distinction between traditional twentieth-century consumption patterns and new/changing on-demand services should still be upheld.

ECONOMIC SERVICE

EU level: The scope of AVMSD is limited to services as defined by Articles 56 and 57 of the Treaty on the Functioning of the European Union (TFEU). These articles cover every type of service with an economic character (i.e., services that are “normally provided for remuneration”). Conversely, the AVMSD excludes “primarily non-economic activities” that are not in competition with TV broadcasting (e.g., private websites, correspondence or privately created content).¹⁰ This last provision specifically aims to exclude audiovisual user-generated content (UGC) that is “shared and exchanged within communities of interest.” The most straightforward indicator to identify an “economic service” is when it is provided in return for remuneration. Remuneration, though, does not necessarily have to come from the actual users of the service (but can also come from sponsorship, advertisement or other sources), nor is it required in each individual case. Not-for-profit services, in other words, are not excluded per se. Conversely, the presence of an advertisement on a website does not automatically imply the service is “economic” (Viola & Cappello, 2011).

National implementation: This seemingly clear criterion has led to diverging interpretations by the different media regulators across Europe. Confronted with a growing diversity of business models, some have tried to clarify the scope of services against remuneration. In this regard, the Belgian Conseil Supérieur de l’Audiovisuel (CSA) has specified that compensation does not have to be pecuniary, nor does it have to go to the actual provider. The decisive element is the economic aim or the competition with other services (which can evolve over time).¹¹ The Austrian Regulatory Authority for Broadcasting and Telecommunications (RTR) has been struggling to assess the economic nature of “video content provided by NGO’s which rely on donations,” as well as political video blogs (Machet, 2011).

Other national authorities have tried to use this criterion to exclude certain categories. In Slovakia, for example, the Council for Broadcasting and Retransmission (CBR) has stated that government websites, blogs, civil society activist websites and so forth typically do not (or only to a negligible extent) create an economic profit and are therefore unlikely to constitute an “economic service” (Council for Broadcasting and Retransmission [CBR], 2009). In the Netherlands too, services offered by private persons or public enterprises will not be considered unless they are offered for remuneration or are of a clearly commercial nature (Betz, 2011; Machet, 2011).

Some media regulators have tried to push aside ambiguity and legal uncertainty by introducing a specific financial threshold. In Italy, for example, to be labelled economic service, revenues have to exceed €100,000, measured at least one year after the start-up (Machet, 2011; Gianni et al., 2011).¹² Unsurprisingly, this threshold has given rise to much criticism. Large enterprises could be discriminated against compared to small(er) enterprises in the same situation. Moreover, the practicability of isolating the actual revenues stemming from the AVMS alone might prove to be hard (Betz, 2011). But, despite its drawbacks, this extra indicator is nonetheless argued to be pragmatic and practical, proportionate and objective (Hermanns & Matzneller, 2011).

Editorial Responsibility

One of the key (and intensely debated) criteria in the AVMSD pertains to the editorial responsibility of a media service provider (not to be confused with the provider's legal liability or social accountability). Article 1(1)(c) of the AVMSD defines editorial responsibility as "the exercise of *effective control* both over the *selection* of the programmes and over their *organisation* either in a chronological schedule, in the case of television broadcasts, or in a catalogue, in the case of on-demand audiovisual media services."

Effective Control

EU level: In line with the intermediary liability exemptions in the e-Commerce Directive 2000/31/EC (2000), service providers that have no actual control over the content itself fall outside the AVMSD's scope of application. Aggregator sites, for example, are often exempted because their control is usually limited to presentational elements only (Betz, 2011). However, when the role of these assembling/cataloguing services amounts to more than the simple organisation of different channels, editorial responsibility might still arise (Hermanns & Matzneller, 2011). Furthermore, the "effective control" criterion has also been defined as the "power to shape the communicative characteristics of a service" (Schulz & Heilmann, 2008). Finally, Chavannes and Castendyk (2008) have suggested looking at which entity owns the broadcasting rights in order to assess who has "effective control."

National implementation: Member states adopt different interpretations of "effective control." This is demonstrated, for instance, by the diverging qualification of catch-up TV services. Whereas most regulators treat them as a traditional video-on-demand (VOD) service within the scope of the AVMSD (e.g., Flemish Community of Belgium, Slovakia, Netherlands, Ireland and the United Kingdom; see Machet, 2011), the Italian communications regulator *Autorità per le garanzie nelle comunicazioni* (AGCOM) does not consider Internet providers offering "non-linear services with catalogues consisting exclusively of programmes previously broadcast in linear

mode (e.g., catch-up TV or archive services)" as AVMS providers (Gianni et al., 2011). AGCOM considers editorial responsibility only to be effective "when selection and organisation are exercised together with the *economic exploitation*" (Machet, 2012). Furthermore, some regulators do not require "effective control" to be practiced permanently. The concrete *possibility* of control suffices according to the Belgian CSA, and if several persons exercise this control successively, the last person is considered to be editorially responsible (Janssen, 2012).

Selection

Effective control over the selection of programmes is generally considered to require a positive action. In other words, editorial responsibility should involve deliberately picking out specific programmes to insert in its service but is not required to determine the actual content itself. This criterion has proven particularly controversial with regard to UGC-platform providers that—arguably—do not make an *ex ante* selection of content (e.g., YouTube, DailyMotion or Vimeo). Increasingly, however, these services are profiling their audience and using algorithms to provide them with customised video selections. Verweij (2011) even argues that the directive does not require an *a priori* selection, but that editorial responsibility can also follow from a *posteriori* removal and the stimulation of users to upload content (the so-called "guided self-selection" model).

Most regulators have not followed this interpretation, though, exactly because these platforms generally only remove content *a posteriori* (through notice and takedown; see Valcke et al., 2010). According to the Italian AGCOM (2010), "websites that only provide an indexing activity of the content uploaded by users, do not fall under the scope of the regulations." In the UK, ATVOD clearly rejected the "guided self-selection model" in the BNP TV case (Authority for Television on Demand [ATVOD], 2010a), in which it ruled that a specific section on the website of the British National Party (BNP) constituted an AVMS, *despite* the fact that it allowed users to upload their own content. Not only was "the majority of content . . . clearly produced specifically for/by the BNP," users were also unable to upload videos directly, but rather had to send them to an administrative e-mail address instead.

Some media regulators have claimed that the selection must be based on criteria related to the profile of the service as well as the actual content itself (Machet, 2011; Conseil Supérieur de l'Audiovisuel [CSA], 2012). ATVOD, by contrast, has decided that the reasons behind the selection are irrelevant (ATVOD, 2012). In some situations, and particularly if an online platform contains both third-party content *and* editorially selected/organised content, the assessment might be more complicated. In these situations, the Dutch media regulator *Commissariaat voor de Media* (CvdM) argues, a distinction should be made. The platform provider should only be held responsible for its own content, whereas the third-party "channels"

on its platform should be regarded as editorially responsible each with regard to their respective content (if the other six conditions are met; see CvdM, 2011; CSA, 2011; Machet, 2011). In other words, professional channels on platforms such as YouTube or DailyMotion (e.g., NMArv, supra) will likely be regarded as AVMS providers in at least a number of member states, such as the Netherlands, Austria, Belgium, Finland, Italy and Slovenia (Machet, 2012).

Organisation

Effective control over the *organisation*, in the online context, usually refers to the cataloguing and presentation of programmes. In order to qualify, this “organisation” has to bring added value to the service. Electronic programme guides (EPGs) are considered as AVMS in several jurisdictions already (Machet, 2012). Such interpretation depends to a great extent on how EPGs are defined. There is a clear difference, for example, between traditional EPGs and backwards-facing EPGs. The latter are also called enhanced EPGs, offering the ability to go backwards and forwards (allowing viewers to navigate to added value services and other extra features such as remote booking, recording, etc.). There is no clear consensus yet on how to assess either one of these (Machet, 2012). Most regulators do seem to agree, though, that merely organising content in alphabetical or chronological order is not sufficient to qualify as an AVMS provider. The same goes for merely making content accessible through a simple search engine (Machet, 2011; CSA, 2012; ATVOD, 2011e).

According to Dutch case law, an organisational element exists when content is put in lists such as “Top Ten,” “Promotions,” “Most Viewed” and “Recently Added.”¹³ The Dutch CvdM clearly stated that this organisation might as well result from adding metadata in order to influence the presentation of the content (to categorise or to improve searchability; see CvdM, 2011). The Czech media regulator requires the categories to be structured based on content criteria (e.g., genre; see Machet, 2011), but does not specify whether this can be automated or not. The automated organisation of programmes based on metadata has given rise to many issues, especially when it is unclear who added the metadata in the first place. Who is responsible, for example, when a third party added the metadata? The one who included the metadata, or the one who used it to structure the content? In 2012, ATVOD held BSKyB—as the provider of the Sky Anytime platform—editorially responsible for Viacom channels (Nickelodeon, MTV and Comedy Central) even though it neither added any metadata concerning these channels nor had the ability to change it. ATVOD ruled that the provision of metadata cannot be determinative. Although ATVOD acknowledged that both parties—BSKyB and Viacom—had a role in organising the programmes and held some degree of control, it was Sky that, on the matter of selection, “on balance” held general control by virtue of it having “final say” over the selection of programmes (ATVOD, 2012).

However, BSKyB successfully appealed this decision; Ofcom quashed the determination—amongst other reasons because ATVOD did not sufficiently address whether any contractual provisions settled any ambiguity as to the allocation of editorial responsibility—and referred the matter back to ATVOD for reconsideration.¹⁴

Identification

The previous sections illustrate the difficulty of identifying the actual editorially responsible entity. Today’s rapidly evolving media landscape, with a multitude of different (types of) actors—all influencing the potential AVMS in one way or another or wearing different hats at the same time—has rendered this exercise even harder. According to the European Audiovisual Observatory and Direction du Développement des Médias (DDM) (2009), the one who is editorially responsible is the one whose brand appears in the service. Digital television providers will generally not be seen as editorially responsible for the individual channels included in their packages even though they aggregate the packages and control customers’ access to them. At the same time, they *will* be editorially responsible with regard to their own channels and VOD services.

Ofcom recently ruled that a contractual clause designating the party editorially responsible in principle prevails (Ofcom, 2012b).¹⁵ In the absence of such a clause, ATVOD considers the following factors to facilitate identification: provision of relevant viewing information, metadata, branding, sponsorship arrangements and so forth (ATVOD, 2011e). The CvdM looks at who has the last say over the cataloguing and who adds the metadata (e.g., title, category, description, etc.). In other words, even though a platform holder might offer a programme catalogue, it will not have editorial responsibility if the cataloguing is entirely based on metadata over which it has no control. The CvdM also states that, if there are multiple players and if it is impossible to identify one person with effective control over both selection *and* organisation, most weight should be given to the one making the actual *selection* (Betzel, 2011; CvdM, 2011). Surprisingly, the Belgian CSA (2012) states the exact opposite. The organiser (and *not* the selector) would be best placed to implement and apply the parental control, age verification and time limit requirements.

Interpretation problems have also occurred in situations where advertisement is selected and inserted by a (independent) third party (Machet, 2012).

Principal Purpose

Quantitative and Qualitative Factors

Another contentious criterion to delineate AVMS is the notion of the “principal purpose” of a service, which implies that the relevant service should be *primarily* focused on providing programmes. Hence, services in which

audiovisual material is merely incidental are excluded. This criterion has been invoked to exclude newspaper websites from the AVMSD. Even though these websites often include videos, these are usually only ancillary to the main purpose (providing written articles). To an increasing extent, however, the accessory nature of these services is being questioned, and some jurisdictions (e.g., Austria, Belgium, Czech Republic, Norway, Sweden, Luxembourg, etc.) have started to consider newspaper websites (or at least their video sections) as AVMS (Machet, 2012).

In an attempt to create more legal clarity, the European Platform of Regulatory Authorities (EPRA) has identified three different approaches to assess the principal purpose criterion: a quantitative, qualitative and hybrid approach (Machet, 2011). The first rather mechanically evaluates the proportion of audiovisual media in order to assess the principal purpose of the service in general. The *quantitative* approach, on the other hand, evaluates both the intention of the service provider as well as “how the service is perceived by a general audience” (infra). The *hybrid* approach, finally, constitutes a more pragmatic mix of the two other methods. Given the growing convergence between different media, authorities will generally take a hybrid approach to assess the principal purpose. After all, it becomes increasingly difficult to categorise a service provider as *only* providing one specific service (AVMS or not). Both traditional AVMS providers (e.g., broadcasters) and normally excluded services (e.g., newspapers) are expanding their offerings, moving further away from—or closer to—the conventional meaning of an AVMS. This is not to mention the emergence of entirely “new” services (e.g., UGC platforms), which are redefining the very meaning of what constitutes an AVMS. Put briefly, although the proportion of audiovisual material on a website definitely has some influence, it is (usually) insufficient to accurately determine the service’s principal purpose. In other words, it is increasingly clear that—from a practical standpoint—one cannot rely on the quantitative approach (only) when assessing media services in such a dynamic environment.

The quantitative approach has—at least partially—been applied in several member states. In Italy, for example, when a service broadcasts for less than 24 hours per week, it is not considered to be an AVMS (Gianni et al., 2011). In the UK, ATVOD (2010b) granted determinative weight to the fact that the audiovisual part of a website contained over 400 videos and constituted a major part of the service as a whole. The CvdM, on the other hand, has clearly criticised this approach as it tries to compare apples with oranges (Machet, 2011).

Most media regulators across the EU have adopted a more hybrid approach. Confronted with ambiguous and multifaceted new services, regulators often examine whether the audiovisual section of a contested service can be considered as a stand-alone service (e.g., ATVOD, 2010f). In other words, when the service as a whole cannot be categorised as an AVMS within the directive’s scope, authorities usually investigate whether

the service consists of several subservices, each of which might constitute an AVMS on their own. A determining factor in the assessment is whether the audiovisual content forms a coherent consumer offering that can exist autonomously. In order to assess this, multiple factors are relevant. Besides taking into account the amount of audiovisual material (quantitative factor), the CvdM (2011), for instance, suggested looking also at the presentation and/or the use of a separate URL, its recognisability and the relationship with other parts on the website (qualitative factor).

The service provider’s marketing strategy is often used as a useful indicator. The use of logos or brands that are generally associated with television (e.g., *Top Gear*, BBC, TV) can be considered too (ATVOD, 2011g; Ofcom, 2012a). The CvdM declared it does not take into account the actual person or company that is offering the service (e.g., traditional broadcaster or not), but does look at the service’s functionality, presentation and how it is used and perceived by the public (Hermanns & Matzneller, 2011). In early 2012, for example, the Dutch CvdM ruled that the town of Zeist’s website—or any of its subsections—did not constitute an AVMS. Even though the website offers a linear, live video stream, it does not contain a video catalogue, and the provision of videos is clearly not its principal purpose.¹⁶ A similar decision was made regarding a website offering users help and support concerning first aid. Taking into account the presentation of the videos and their relation vis-à-vis the textual part of the website, the CvdM concluded that the service did not have the provision of videos as its principal purpose.¹⁷

ATVOD considered different factors in different cases: as examples, the provider described its own service as a “digital film and television service” in a communication to its customers (ATVOD, 2010g); the website’s homepage featured a trailer and several links to films and TV series that could be downloaded on the site (ATVOD, 2010c); the Terms and Conditions state that the service gives the public access to thousands of film titles (ATVOD, 2010e).

Online News Services

The interpretation of “principal purpose” has led to intense discussions—and diverging solutions—in the context of news video websites offered by newspapers. A landmark case in this regard is the Sun Video case in the UK (ATVOD, 2011f; Ofcom, 2011b; Metzendorf, 2012). Whereas ATVOD had determined that the video section on the tabloid’s website constituted an on-demand AVMS, Ofcom overruled its decision. ATVOD’s arguments included that (a) a website can contain more than one service; (b) the video is aggregated on a discrete section of the website; (c) it is moreover presented as a consumer destination in its own right (Sun TV); (d) viewers are not invited to consider the content as subsidiary (to the written material); and (e) videos make sense without the textual articles. Ofcom did not agree and found that ATVOD had put too much emphasis on the video section alone, without proper consideration of the overall content and its relation with

the video section. It considered the presentation and marketing of Sun TV insufficient to prove principal purpose and found that for most videos, there was a "Read Full Article" link with a text providing more context, meaning, comments and implications. The website's video section was therefore still too intertwined with textual content and could not be considered an AVMS in its own right. Ofcom *did* recognise, though, that services such as the one concerned might in the future develop to a point where the principal purpose changes.¹⁸ According to several media regulators in Europe, this point has already been effectively reached. In four decisions of October 2012, the Swedish Broadcasting Commission considered the video sections of Swedish newspapers' websites (*Helsingborgs Dagblad*, *Aftonbladet*, *Dagens Nyheter* and *Norran*) as AVMS. These video sections constituted a significant part of the websites and—more importantly—were considered to be separate services in relation to other content on the websites (organised in catalogues such as "Sports" and "News"; see Swedish Broadcasting Commission, 2012). Also the Danish Radio and Television Board and the Slovak Council for Broadcasting have come to the conclusion that video sections of newspaper websites constitute AVMS (Machet 2012; EMR 2012).

Programmes

In order to qualify as an AVMS, the service has to provide access to "programmes." Article 1 (1)(b) of the directive defines a programme as "a set of moving images with or without sound constituting an individual item within a schedule or a catalogue established by a media service provider and whose form and content is comparable to the form and content of television broadcasting." Animations, as in the case of NMArtv, seem to be covered by the notion of "moving images."

The "programme" requirement is—arguably—the most flawed concept with regard to the directive's intention of being "technologically neutral." The directive was meant to apply to certain content in a certain context, regardless of the technology used. Although the reference to traditional TV broadcasting is understandable in the short run (wanting to create a level playing field), it necessarily leads to difficulties in the long(er) run. The rapid transformation of the media landscape challenges the very meaning of what constitutes "an item . . . comparable to . . . television broadcasting" (TV like). Meanwhile, new (types of) services might not constitute "programmes" *stricto sensu*, but regulation might seem sensible nonetheless. This debate leads to a wider discussion on the very rationale behind the AVMSD itself.

Recital 24 explains that the service should "compete for the same audience as television broadcasts, and the nature and the means of access to the service would lead the user reasonably to expect regulatory protection." The recital continues by saying that "the concept of 'programme' should be interpreted in a dynamic way taking into account developments in television

broadcasting," for instance, to take into account the trend towards offering videos of shorter duration, produced especially for mobile services ("mobileisodes"). It remains unclear, though, how national regulators should apply this criterion to typical online content (e.g., short video clips) that would not constitute a "programme" on traditional television broadcasting. The European Audiovisual Observatory and DDM (2009) expressed concerns on how to interpret trailers, advertisements and videos such as "highlights," since specialised websites only consist of these kinds of videos. Also service providers that traditionally fall within the scope of AVMS regulation do not always offer a concrete TV format anymore. The Czech authority has struggled to qualify TV broadcasters' "services connected to the presentation of certain services or products of companies (e.g., a video guide)" (Machet, 2012).

A wide variety of factors is being used by media regulators to assess the TV likeness of a certain service and to judge whether form and content of the service concerned are comparable to TV programme conventions. The CvdM will not consider raw audiovisual material, lacking a professional editing process (e.g., adding features such as introduction, subtitling, voiceover, etc.), as TV like (Machet, 2011). According to ATVOD (2011a),¹⁹ the fact that videos are edited (opening sequence, filtered images, voiceover, interviews, on-screen presenter, etc.) often is a strong indicator of TV likeness. Nevertheless, barely edited footage (e.g., speeches and news-style footage) can still be considered TV like too if the form and content are comparable (ATVOD, 2010a). Additionally, ATVOD considers the following criteria to evaluate the TV-like characteristic of a service: the availability of a full-screen mode and the fact that videos are preceded by advertisements (2011a), episodic nature (2011c), self-contained narrative feature (2011b), end credits, soundtrack, title sequences, adopts dramatic/fictional conceits and so on (also see Ofcom, 2011a). The following are generally deemed to be irrelevant to assess the TV likeness of a service: length (ATVOD, 2010d) and prior broadcast (2011d). Two landmark cases are the BBC Food and *Top Gear* YouTube cases, in which ATVOD's scope determinations (ATVOD, 2011g) have been reversed by Ofcom. According to Ofcom, the video clips did not fulfil the "comparability requirement" and hence could not be considered as AVMS (Ofcom, 2013); they began and ended abruptly and were only parts of full-length television programmes. Ofcom acknowledged that the grouping of videos into playlists with the ability to "auto-play" made the content more comparable to linear television programme services but did not conclude, in the case at hand, that the auto-play function changed the fact that clips still began/ended abruptly without any "links" connecting them to each other. Video playlists are not TV like if they do not link the individual clips into a coherent whole (with a narrative, etc.).

A last case worth mentioning here is the one involving Playboy's Climax 3 Uncut and Demand Adult online services, in which Playboy argued that its

online services could not possibly be considered as TV like; they contained content that is prohibited, and hence never shown, on broadcast television. Ofcom, however, ruled that the form and content of the programmes are required "to be 'comparable', not 'identical'," and so confirmed ATVO's view that Playboy's online services constituted on-demand programme services (Ofcom, 2011a).

General Public

One of the more straightforward criteria to identify an AVMS is that it has to be directed to the general public. Recital 22 of the directive specifies that the service in question needs to be "mass media." This means that the service is "intended for reception by, and . . . could have a clear impact on, a significant proportion of the general public."

To assess the general public requirement, one should look both at the intention of the service provider and the (actual and/or potential) availability of the service. According to the Belgian CSA, the actual number of people who are using the service (if any at all) seems—like in the field of intellectual rights—a priori less adequate than the *potential* number of users (Machet, 2012). Some member states apply a quantitative threshold as a "de minimis" rule. In Germany, for instance, when more than 500 persons cannot use a service simultaneously, it is excluded from the scope of regulation (Machet, 2011).

The fact that services require payment in order to be accessible does not exclude them from being qualified as an AVMS. Services that can only be accessed with a password or pincode are not necessarily excluded either (Cvdm, 2011), as long as they are available to anyone who wants to access them under the generally applicable terms and conditions set by the provider.

The Austrian regulator RTR has been struggling to assess the "general public" criterion with regard to university VOD services (Machet, 2011). Also, broadcasting services in public places—but closed circuits—such as airports, public facilities or shops (so-called "in-store channels"), usually are not considered to fulfil the requirement (Council of the European Union, 2006; AGCOM²⁰). The Belgian CSA (2011) did, however, suggest the exact opposite: all services accessible to the public are covered. This would also include railway stations as long as the content is not specifically targeted at the actual travellers/customers. An intentional element seems to be necessary in order to fulfil the general public requirement. But the "intention" of the service provider will often be hard to determine in practice. A useful criterion that was deployed at the time of the Television without Frontiers Directive is to determine whether the recipients are individually identified or identifiable (Contact Committee, 2008). Nevertheless, this test can be misleading with regard to services that are directed to the general public but can be tailored to specific individual needs (e.g., VOD offerings such as Netflix, LOVEFILM, etc.). The Cvdm (2011) tried to clarify this by stating that a VOD service should not be considered as an AVMS when it is exclusively intended to serve

the interest of a limited group and has no profit goals or advertisement (e.g., video services for local churches, sports teams, schools, hospitals, etc.).

Inform, Educate, Entertain

To qualify as an AVMS, the service should be offered with the intention to "inform, entertain or educate." Due to its intentional broadness and vagueness, this criterion is likely to cover almost any information targeted to end users. The changing media landscape does not change the fact that media, whether old or new, is inherently aimed to inform, entertain or educate. One of the only issues to arise in this context is how to assess platforms that are mainly intended as a marketing platform. In the Netherlands, for example, concerns have arisen on VOD services used as a marketing tool by companies that traditionally do not provide media services at all (e.g., RaboSport.nl, redbull.com; see Betzel, 2011).

Electronic Communications Networks

In order to qualify as an AVMS, programmes need to be delivered over electronic communications networks within the meaning of Article 2(a) of Directive 2002/21/EC. Such networks include cable, microwave, satellite, Internet and mobile networks. This criterion is mainly intended to limit the scope to situations similar to the traditional broadcasting model of intangible content delivery. Cinema screenings and the rental and sale of DVDs are, consequently, excluded. But with ever-growing bandwidth, these last two businesses are gradually moving to the intangible sphere as well (e.g., both Netflix and Amazon are increasingly moving from tangible to intangible media).

CONCLUSION

Going back to our example of NMArtv YouTube, it could be argued that the criteria described in this section are fulfilled and that NMArtv—if it were based in the EU instead of Taipei—would fall within the scope of the AVMSD. As the BBC Food and *Top Gear* YouTube cases in the UK have shown, however, the issue of whether their video clips constitute "programmes" that are sufficiently TV like could give rise to discussion.

NMArtv is an excellent example of how the lines between services that are regulated vis-à-vis services that are *not* is gradually blurring. This raises fundamental questions about the future scope of digital audiovisual media regulation. Is the current definition of AVMS still apt to achieve the policy goals—in relation to cultural diversity, protection of minors, prohibition of hate speech, and so forth—that the current regulation attempts to pursue? Major challenges in our view follow from the growing use of automated selection tools and algorithms. As the European Commission stresses in its

Green Paper on Media Convergence, filtering and personalisation mechanisms have a clear potential for empowering citizens by allowing them to navigate efficiently through today's information overload and to receive tailor-made services corresponding to their individual needs. At the same time, this may decrease the role of the media as editors in the public sphere and strengthen the role of platform providers. As their influence on the de facto choice for citizens to access media offerings grows (e.g., by varying the prominence with which certain content is displayed), is it still fair to put the regulatory onus only on the "TV-like" AVMS providers who are held to have "editorial responsibility" in the traditional sense? As we noted in an older contribution, the providers of "intermediate functions" in the digital media value chain (i.e., intermediate between the editing and provision of content, on the one hand, and the provision of transmission networks and services over and via which that content travels, on the other hand) currently fall in between the AVMSD on the one hand and the electronic communications directives on the other hand (Valcke, 2008). It remains to be seen whether the Green Paper on Media Convergence will trigger (again) the debate on a fair allocation of responsibilities in the digital media value chain. In this debate, it is the role of academics to investigate more deeply the exact nature of the selection, filtering and organisation activities of different actors (including the citizens themselves when using technologies for personalised search) and assess which "editorial impact" should trigger specific obligations in order to achieve the policy goals that we still value in the digital media environment.

NOTES

1. The research for this contribution has been financed by the European Commission (in the context of *Experimedia*, a project under the Seventh Framework Programme; www.experimedia.eu), the Flemish Agency for Innovation by Science and Technology (IWT-SBO-EMSOC project; www.emsoc.be), and iMinds (www.iminds.be). The chapter was completed on 1 July 2013.
2. This merger resulted in viewing possibilities extending from TV sets with added Internet connectivity, through set-top boxes delivering video content "Over-the-Top" (OTT), to audiovisual media services provided via PCs, laptops or tablets and other mobile devices.
3. To a growing extent, consumers use tablets or smartphones while simultaneously watching TV—for instance, to find out more about what they are watching or to interact with friends or with the TV programme itself.
4. The chapter will not touch upon jurisdictional challenges in an online video-on-demand environment; for a discussion of those, see, for instance, R. Craufurd Smith (2011), pp. 263–285.
5. The AVMSD was the successor of the Television without Frontiers Directive (itself adopted in 1989 and amended a first time in 1997) and was codified in 2010.
6. Article 1(1)(a) AVMSD. The notion also includes audiovisual commercial communication (such as advertising, sponsoring, product placement, etc.).

7. On the condition that they are sufficiently "TV like," meaning that the non-linear service competes for the same audience as linear television broadcasts and that the nature and the means of access to the service would lead the user to reasonably expect regulatory protection (Recital 24 AVMSD; see also *infra* in the text).
8. The AVMSD motivates this distinction on the basis of the presumed higher impact on public opinion and lower degree of user control in the case of linear services (Recital 58).
9. NMArtv can be watched from YouTube: www.youtube.com/nmaworldeidition; see also the website of Next Media Animation at www.nma.tv/about/.
10. Recital 21.
11. www.epra.org/attachments/portoroz-plenary-1-new-services-and-scope-presentation-by-marc-janssen.
12. Also check references to legal documents in http://epra3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary%201_overview_responses_questionnaire_publicversion.pdf?1340972148, p. 13.
13. See, for instance, the following decisions of the Dutch media regulator *Commissariaat voor de Media*: Ziggo on Demand (5 June 2012), and Younity Media B.V. (8 May 2012), available at its website: www.cvdn.nl/besluiten/. In another case, categorisation based on genre was also deemed sufficient (Filmotech Nederland, 5 June 2012).
14. www.digitalteurope.net/26261/ofcom-refers-sky-and-viacom-dispute-back-to-vod-regulator and <http://stakeholders.ofcom.org.uk/binaries/enforcement/vod-services/bskyb-appeal.pdf>.
15. Unless it clearly contradicts the facts, in which case the clause will not be deemed determinative.
16. www.zeist.allesvan.nl, www.cvdn.nl/content.jsp?objectid=12815.
17. www.chbo.nl, www.cvdn.nl/content.jsp?objectid=12813.
18. Ofcom's decision in this case has led ATVOD to withdraw also its determinations with regard to websites of the *Sunday Times*, the *Telegraph*, the *Independent*, the *Financial Times*, the *Guardian*, the *News of the World* and *Elle*. This decision is currently being reviewed after the initial decision was overturned by Ofcom. www.digitalteurope.net/31224/atvod-ruling-overturned-on-appeal; www.atvod.co.uk/news-consultations/news-consultationsnews/20121214-channel-flip-appeal.
20. See reference to Italy in the Comparative Background Document (by E. Machet) for the plenary meeting at the 35th EPRA meeting in Portoroz, 2012), available from the website of EPRA (European Platform of Regulatory Authorities) www.epra.org/ (direct link: http://epra3-production.s3.amazonaws.com/attachments/files/2011/original/Plenary%201_overview_responses_questionnaire_publicversion.pdf?1340972148), at p. 16.

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- activities—commonly known as the “Television without Frontiers Directive” (Official Journal of the European Union (1989) L 298/23), as amended by Directive 97/36/EC (Official Journal of the European Union (1997) L 202/60) and Directive 2007/65/EC (Official Journal of the European Union (2007) L 332/27). Autorità per le garanzie nelle comunicazioni (AGCOM). (2010). *Web-radio and web-TV*. F.A.Q. Retrieved from www.agcom.it/default.aspx?message=contenuto&DCId=495
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3 Making TV Accessible in the 21st Century

Peter Looms

INTRODUCTION

Television in the 21st Century

Following the appearance of TV as a medium in 1928, viewing television programmes was initially a *social* experience. For the first few decades, the TV television receiver itself was relatively expensive, and TV viewing was therefore a collective activity. The television signal was initially delivered to TV screens by terrestrial broadcasting on analogue networks.

Towards the end of the 20th century, TV sets became cheaper in relative terms. The distribution of TV via terrestrial broadcasting was joined by distribution over digital cable and satellite networks and then by networks using the Internet protocol. The number of available channels increased with the emergence of pay TV. The remote control became an important prerequisite of viewing. With more channels to choose from, the viewer could discover and select something to view without going over to the TV receiver to change the channel. Middle-class homes had two or more TV sets. Being able to watch TV content on small handheld devices moved into the mainstream.

The emergence of devices like iPods and streaming music services in the noughties also changed consumer attitudes to content and its delivery. Just before the turn of the century, Bill Gates (1999), in a keynote at Telecom '99 that talked about his company's mission, also foresaw major changes in media such as radio and television:

Software will play a critical role in helping businesses and consumers gain universal access to their information," Gates said. "Microsoft's mission is to provide the technology and platform building blocks that will enable new services to be deployed on broadband networks and to integrate with the PC, television and telephone, as well as a new generation of intelligent devices. We intend to offer customers access to their information *any time, anywhere and on any device*.